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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 281.

EDMUND P. DWIGHT, JOHN C. BULLITT, AND CLARA W. DWIGHT, EXECUTORS OF ISAAC S. WATERMAN, DECEASED, PLAINTIFFS IN ERROR,

vs.

EDWIN A. MERRITT, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 24, 1887.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Edmund P. Dwight, John C. Bullitt, and Clara W. Dwight, executors of Isaac S. Waterman, deceased, plaintiffs, and Edwin A. Merritt, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

Seal of U. S. Circuit Court, South. Dist. New York.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

ADDISON BROWN, *Dist. Judge.*

N. Y., Oct. 11th, 1887.

2 [Endorsed:] 7506. U. S. Supreme Court. Edmund P. Dwight & o'rs, pl'ffs in error, *vs.* Edwin A. Merritt, def't in error. Writ of error. Stanley, Clarke & Smith, att'ys for pl'ffs in error, 120 B'way, N. Y. city. Due service of a copy of the within writ of error is hereby admitted. N. Y., Oct. 13th, 1887. Stephen A. Walker, attorney for defendant in error.

[Stamped:] U. S. circuit court. Filed Oct. 14, 1887. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-eight, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Edmund S. Dwight, John C. Bullitt, and Clara W. Dwight, executors of Isaac S. Waterman, deceased, plaintiffs in error, against Edwin A. Merritt, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22d day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

Seal of U. S. Circuit Court, South. Dist. New York.

TIMOTHY GRIFFITH, *Clerk.*

3 Superior Court of the City of New York.

ISAAC S. WATERMAN, Plaintiff, *against* EDWIN A. MERRITT, Defendant. } Summons No. 1.

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated N. Y., December 7, 1887.

STANLEY, CLARKE & SMITH,
Plaintiff's Attorneys; Office, No. 158 *Broadway, New York City.*

(Endorsed:) No. 1, 7506. N. Y. superior court. Isaac S. Waterman *vs.* Edwin A. Merritt. Summons. Stanley, Clarke & Smith, pl'ff's att'ys, 159 B'way, N. Y. Received U. S. attorney's office, Dec. 17, 1881.

4 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in [L. S.] the second circuit, shall be certified of a certain cause commenced before you against Edwin A. Merritt, defendant, by Isaac S. Waterman, plaintiff—

Do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 14 day of January, 1882, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 10 day of January, in the year one thousand eight hundred and eighty-two.

JOSEPH M. DEUEL, *Clerk.*

STEWART L. WOODFORD,
U. S. Attorney, Attorney for Defendant.

5 (Endorsed:) U. S. circuit court. Isaac S. Waterman *vs.* Edwin A. Merritt. Copy. Certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Jan'y 10, 1882. Yours, Stewart L. Woodford, U. S. attorney, attorney for defendant. To Stanley, C. & S., plaintiff's attorneys. Due service of a copy of the within and of the above notice is hereby admitted. New York, Jan'y 10, 1882. Stanley, Clarke & Smith, plaintiff's attorneys.

6 Circuit Court of the United States for the Southern District of New York.

ISAAC S. WATERMAN, Plaintiff,
against
EDWIN A. MERRITT, Defendant. } Complaint.

Plaintiff complains—

1st. That defendant was during the times hereinafter named collector of customs of the United States at the port of New York.

2nd. That plaintiff during said time transacted business under the firm name of Waterman & Co. and under that name duly imported at the port of New York the goods described in the bill of particulars annexed; that said goods were entered in the name of Brown Brothers & Co., the bankers of the plaintiff, June 16th, 1880, at said port of New York, but that the plaintiff, under his firm name of Waterman & Co., withdrew said goods from warehouse June 1st, 1881, and paid duties thereon to the defendant, as hereinafter stated.

3rd. The defendant as such collector exacted from plaintiff
7 as and for duties thereon, viz., five thousand eight hundred and eighty-one and $\frac{40}{100}$ dollars.

4th. That by the laws of the United States the true duty upon said goods was three hundred and $\frac{75}{100}$ dollars, but plaintiff, in order to obtain said goods, was compelled to pay the sum of two thousand eight hundred and eighty and $\frac{65}{100}$ dollars, in gold coin of the United States, in excess of the amount required by law.

5th. That plaintiff filed with said defendant due and timely protest in writing upon his withdrawal entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

6th. That plaintiff made due and timely appeal in each case to the Secretary of the Treasury, who has affirmed the decision of defendant.

7th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protest, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

8th. That said sum so exacted as aforesaid has never been repaid to plaintiff and is still due and owing to him.

8 Wherefore plaintiff demands judgment against defendant for two thousand eight hundred and eighty and $\frac{65}{100}$ dollars, in United States gold coin, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

STANLEY, CLARKE & SMITH,
Attorneys for Plaintiff.

(Endorsed:) 7506. N. Y. superior court. Isaac S. Waterman *versus* Edwin A. Merritt. Complaint. To S. L. Woodford, Esq., att'y for def't. Stanley, Clarke & Smith, pl'ff's att'ys, 158 Broadway, New York city.

9 *Bill of Particulars.*

Name of importer (for all the importations): Waterman & Co.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
Old iron rails..	Pillau..	Bjornstene Bjorson.	1880. Ap'l—	1881. June 13 or 16.	2,880 65	1881. June 1	1881. June 4	1881. June 21	1881. Sept. 10.

10 (Endorsed:) 7506. U. S. circuit court, southern district of New York. Isaac S. Waterman against Edwin A. Merrit. Complaint and bill of particulars.

NEW YORK, *Jan'y* 10, 1882.

To S. L. Woodford, Esquire, defendant's attorney.

SIR: Please take notice that this action is brought to recover

duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars.

STANLEY, CLARKE & SMITH,
Plaintiff's Attorneys, 158 *Broadway*.

Received, U. S. attorney's office, Jan. 10, 1882.

11 United States Circuit Court, Southern District of New York.

ISAAC S. WATERMAN
versus
EDWIN A. MERRITT, Collector, etc.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiff in the above-entitled action.

I. He admits he was at the times in said complaint mentioned collector of the port of New York, and in such official capacity received payment from the plaintiff for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiff into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiff at the times in said complaint mentioned were paid by said plaintiff as a debt due by him to the United States, and not otherwise, and were received by defendant by virtue of his office as said collector and under the direction of the Secretary of the Treasury and for and on account of the United States, and were forthwith thereafter and before the commencement of this action or the
12 service of any protest paid into the Treasury of the United States, and that the amount of said moneys so received from plaintiff were the amounts due from him to the United States according to the rate of duty imposed by law upon the several articles of merchandise by him imported and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiff.

III. And defendant, further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint by the marks and numbers and description there given, except in so far as to state, and defendant, herein answering, doth aver and state, that said merchandise was not dutiable according to the laws of the United States at the rates specified in the complaint.

IV. And defendant, further answering, admits that plaintiff filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiff con-

formable to the laws of the United States, and defendant leaves plaintiff to make such proof thereof as he may be advised.

13 V. And as to any other allegations in said complaint contained not hereinbefore fully answered or admitted defendant denies the same and each thereof, and leaves the plaintiff to make such proof thereof as he may be advised.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

(Endorsed:) 7506. U. S. circuit court, southern district of New York. Isaac S. Waterman *vs.* Edwin A. Merritt, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, Jan'y 16, 1882. Stanley, Clarke & Smith, plaintiff's attorneys. To S., C. & S., plaintiff's attorneys.

14 United States Circuit Court, Southern District of New York.

ISAAC S. WATERMAN
vs.
EDWIN A. MERRITT. } No. 7506.

On reading and filing the affidavit of Benjamin Barker, Jr., and the exemplified copy of letters testamentary annexed thereto, and on motion of Stanley, Clarke & Smith—

It is ordered that the above action be, and the same is hereby, revived by the substitution of E. P. Dwight, Clara W. Dwight, and John C. Bullitt, administrators, as parties plaintiff in the above action.

Dated New York, December 10th, 1885.

(S'g'd) HOYT H. WHEELER.

Notice of the within motion hereby waived.

WILLIAM DORSCHEIMER,
S.
U. S. Attorney, Attorney for Defendant.

(Endorsed:) No. 7506. U. S. circuit court, so. dist. of N. Y. Isaac S. Waterman *vs.* Edwin A. Merritt. Copy order. Stanley, Clarke & Smith, attorneys for plaintiff, No. 165 Broadway, N. Y. city. U. S. attorney's office. Received Dec. 10, 1885.

15 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 25th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Nathaniel Shipman, judge.

C. P. DWIGHT, CLARA W. DWEIGH, and JOHN G. BULLETT, Administrators of Isaac S. Waterman, Deceased,
vs.
EDWIN A. MERRITT. } 4506.

Now come the plaintiffs, by Stanley, Clark & Smith, their attorneys, and move the trial of this cause. Likewise comes the defendant, by McGran Cox, ass't U. S. att'y, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court the jury retire and render a verdict, whereby they find for the defendant.

On motion of counsel for pl'ffs, it is ordered that plaintiffs have a stay of proceedings in said verdict until the decision on the motion for a new trial herein.

TIMOTHY GRIFFITH, *Clerk.*

16 U. S. Circuit Court, Southern District of New York.

E. F. DWIGHT *et al.*, Administrators, &c.,
vs.
EDWIN A. MERRITT. } 7506. Judgment.

The issues in this action have been brought on for trial before Mr. Judge Shipman and a jury at a circuit court of the October term, 1885, and the issues having been tried and a verdict for the defendant having been duly rendered on the 25th day of January, 1886, and his costs having been adjusted at $48.85, now, on motion of Stephen A. Walker, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 11th day of Oct., 1887, *nunc pro tunc*, as of Sept. 30, 1887, as per ord. of c't.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) United States circuit court. E. F. Dwight *et al.*, administrators, &c., *vs.* Edwin A. Meritt. Judgment-roll. Stephen A. Walker, United States attorney, *got* defendant. Filed ——,
17 187–. Costs, $48.85. U. S. circuit court. Filed Oct. 11, 1887. Timothy Griffith, clerk.

18 United States Circuit Court, Southern District of New York.

E. P. DWIGHT *et al.*, as Executors, etc.,
vs.
EDWIN A. MERRITT, Collector. } N. S. 7506. Plaintiffs' Bill of Exceptions.

Afterwards, to wit, on the 25th and 26th days of January, 1886, at a stated term of this court begun and holden on the third Monday of October, 1885, at the city of New York, before the Honor-

able Nathaniel Shipman, district judge of the United States for the district of Connecticut, appointed to hold the said circuit court according to the form of the statutes in such case made and provided, the aforesaid issue so joined between the said parties aforesaid, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said plaintiffs being represented by their attorneys, William Stanley, Esq., and Stephen G. Clarke, Esq., and Macgrane Coxe, Esq., assistant U. S. attorney, appearing in behalf of the defendant, and was brought to recover an excess of duties alleged to have been illegally exacted by the defendant, as collector of the port of New York, upon an importation of iron rails, which the defendant collector classified for duty at 70 cents per hundred pounds, under the paragraph of Schedule E of section 2504 of the Revised Statutes of the United States, which imposes that rate of duty upon "iron bars for railroads or inclined planes."

19 To sustain the issues upon the part of the plaintiffs testimony was introduced showing the importation of the goods in question by the plaintiffs' intestate in the condition and under the circumstances below stated.

The invoice marked Plaintiffs' Exhibit 1, entry marked Plaintiffs' Exhibit 2, withdrawal entry marked Plaintiffs' Exhibit 3, and protest marked Plaintiffs' Exhibit 4 were then introduced in evidence as follows:

Ex. 1.

"PILLAU, 15*th April*, 1886.

Messrs. Brown Brothers & Co., New York, Drs.

To 1,827 pieces iron rails, rusty, shipped per "Bjornstjerne Bjornson," Capt. Nielsen, to New York—weight, 375 T., 1, 2, 20, at M $118.32 per ton—fr. C. Pillau, incl. all shipping charges, M 44,379.95.

Appraiser's Report.

Iron railway bars, 70 cts. p. 100 lbs.
July 3, '80.

J. C. B.

Approved:
J. Q. HOWARD, *Appraiser.*"

20 Ex. II.

Invoice dated Pillau, 15 Ap'l, 1880.

Entry of merchandise imported on the — day of June, 1880, by Brown Bros. & Co., in the ship Bjornstjerne Bjornson, —— ——, master, from Pillau.

NEW YORK, *June* 15, 1880.

Nos.		
1827, eighteen hundred and twenty-seven, pieces old iron rails, 8.00 p. ton	44,379	95
2½% comm.	1,109	45
	45,489	40

21 Ex. III.

Bond No. 10171.

CUSTOM-HOUSE, COLLECTOR'S OFFICE, *May* 13, 1881.

Entry of merchandise intended to be withdrawn from warehouse by Waterman & Co., which was imported into this district on the June 3rd, 1880, by Brown Bros. & Co., in the ship "Bjornstjerne Bjornson," —— ——, master, from Pillau.

Nos.	Packages and contents.	
1825,	eighteen hundred & twenty-five, pieces old iron rails, 840,200 lbs., 70 cts. p. 100 lbs.	$10,826

We hereby authorize Messrs. Waterman & Co. to withdraw the above mdse.

May 13, '81.

BROWN BROTHERS & CO.

840,200, — 70 cts., 5,881.40.

WATERMAN & CO.

22 Ex. IV.

NEW YORK, *June 1st*, 1881.

Hon. E. A. Merritt, collector of the port.

SIR: We *are* hereby protest against the payment of duty as exacted of seventy cents per one hundred pounds on eighteen hundred and twenty-seven pieces old iron rails which were imported per ship "Bjornstjerne Bjornson," from Pillau, June 13th, 1880, and entered on warehouse entry No. 70345 by Brown Bros. & Co., under bond No. 10171.

We claim that this lot of rails (about 375 tons) was purchased and imported as old iron rails with the sole purpose of being broken up, and fit only for manufacture, consequently they should only pay a duty of eight dollars per ton under R. S. approved June 22, 1874, sec. 2504, Schedule E, paragraph 1035, as old iron rails fit only for remanufacture. We further claim that it is an evident error on part of the appraiser in returning said rails as fit for use, dutiable at seventy cents per one hundred lbs., and that it is a great injustice to exact duty at that rate on said rails. We have paid the excess, $2,880, demanded, but request that you will authorize the reliquidation of our said entry and return to us the amount paid in excess of the correct duty.

Respectfully, WATERMAN & CO.

Received June 4, 1881.

23 The rails in question were completed rails and were imported by Waterman & Co., of Philadelphia, from Russia, for the purpose of breaking them up and remanufacturing them in Waterman's rolling mill, at Danville, Pennsylvania. They were in

fact taken to that mill and broken up and remanufactured into iron bars for railroads. They were of so high a pattern as to make them unsafe for use on railroads in this country. They were so short that they required one-third more bolts, spikes, fish-plates, and fastenings than American rails. The pattern was not in use anywhere in this country. They were of excessive weight per foot, and therefore too expensive for use here. They cost Waterman & Co. about $32 per ton besides duties, and new rails at the time were worth in this country from about $48 to about $65 per ton. After their purchase Waterman & Co.'s mill changed hands, and they sold them to the Montour Steel & Iron Co., of Danville, the new owners of the mill, for $26.60 per ton.

The rails were fit in this country only for remanufacture, and were not merchantable in this country except for remanufacture. They were finished and completed rails for a railroad and had been sent to Russia. There was no evidence that they had ever been used for any purpose whatever or had ever been laid upon a railroad, except that they were when imported somewhere from three to eight years old and were rusty.

Upon cross-examination by counsel for the defendant the plaintiffs' witnesses testified in substance that the fact that the
24 rails imported weighed considerably more per yard than the rails then in use on American railroads render them too expensive for profitable use on such railroads in the shape imported, and that at the time of their importation it would have paid better to import a new rail of this character, provided it could be entered under the scrap-iron duty and remodelled for the purpose of making railroad rails, than to buy pig-iron and manufacture the rails from that; that for the purpose of making new iron rails these rails were three processes further advanced than pig-iron would be, and that they could not say whether or not the rails in question have ever been in actual use prior to the date of their importation.

Plaintiffs' counsel called as a witness WILLIAM E. C. COX, who testified that he was president of the Montour Iron & Steel Company, at Danville, and superintendent of the Philadelphia and Reading rolling mill, and had been familiar with scrap iron for thirty years.

"Q. What does scrap iron include?
A. It includes all sort of waste and refuse iron."

Defendant's counsel objected to the question and moved to have the answer stricken out, stating the ground of objection to be that the testimony is incompetent and immaterial, since the statute itself defines scrap iron. The court granted the motion, and plaintiffs' counsel duly excepted.

"Q. What is waste iron?"

Defendant's counsel objected to this question on the ground last above stated.

The COURT: State exactly what you propose to prove.

25 Mr. STANLEY: I propose to prove that in trade and commerce the words scrap iron is a general term; that scrap iron is divided into two classes of iron—waste iron and refuse iron; that waste iron is that class of scrap iron which is new, such as, for instance, punchings and clippings or croppings of railroad bars, and such other articles, as defective patterns or otherwise, are not fit for the purpose for which the article was originally intended; that refuse iron is that class of scrap iron which comes from worn-out articles of iron, such as the tires of wagon wheels, old machines or tools, horseshoes, or things that are no longer fit for the purposes for which they were originally intended.

Mr. COXE: I object to the admission of all evidence of that nature at any time in this trial for the reason that I have already given, namely, that scrap iron is defined by the statute and that the trade designation is not competent, and I further object to the admission of the testimony at this stage of the trial for the reason that it has not been proven that the importations in question had ever been in actual use prior to this importation; that the words in the statute, "that has been in actual use," refer to waste iron as well as to refuse iron, and that therefore the testimony offered is immaterial.

The COURT: I think that the definition of the statute is controlling, and I think the definition is intended to embrace refuse iron that has been in actual use in one and the same clause, "except waste and refuse iron," and that the clause "that has been in actual use" refers as much to refuse as it does to waste.

26 The court sustained the objection and plaintiffs' counsel duly excepted.

Plaintiffs' counsel then continued his examination as follows:

"Q. What is refuse iron?"

Same objection, ruling, and exception.

Plaintiffs' counsel also called as a witness WILLIAM C. FRICK, who duly testified that he was superintendent of the Danville Rolling Works and an expert in scrap iron. The plaintiffs stating that the testimony was not offered for the purpose of proving any commercial distinction between waste and refuse iron or what scrap iron was commercially, he testified that scrap iron was composed of two classes of iron—iron that has been in use and iron that in the process of manufacture is spoiled either by the quality of it or by the rolling of it, so that it cannot be put into use as the finished product it was intended for. He testified that in rolling rails in a mill the iron has to pass through the rolls a number of times—maybe eight or ten. If when it is within two passes of being finished it becomes defective it is then at once thrown off one side and sheared up and put back into the furnace. It is scrap iron. In order to roll a rail thirty feet long and get thirty feet that are perfect and fit to go into a railroad you are compelled to roll it from 31 to 36 feet long, some feet at each end having to be cut off. That cut-off is scrap iron that has never been in use and it is fit for no purpose other than remanufacturing. It goes right back into the furnace

and is rerolled. In the process of manufacturing rails, when
27 a rail is so far along as to be within one pass through the rolls of being completed it is in the shape of a rail, but a pass may have made the flange a little bit thinner and changed the shape of the head a little. The last pass may make it a marketable rail. If it doesn't get that pass it is but scraps; nobody would have it. The other scrap iron is old car axles, old rails that have broken, old broken tires, and old sleigh-shoes, old boilers. Blacksmith scrap is almost invariably new iron, such as clippings of bars. For instance, a blacksmith wants to make a bar four feet long and the bar is four feet six inches, he has to cut six inches off that bar and throw it into the scrap. Scrap of all descriptions is imported.

Plaintiffs having rested and it having been stipulated that if the jury should find a verdict in favor of the plaintiffs on the question of classification raised by their protest a verdict shall be entered generally in their favor, subject to adjustment as to formal prerequisites and amount at the custom-house, under the direction of the court, the counsel for the plaintiffs requested the court to direct a verdict in favor of the plaintiffs. The court having declined so to do, the plaintiffs, by their counsel, duly excepted.

The defendant then introduced witnesses whose testimony tended to prove that the rails in suit were all of the same length and weight and not broken on the edge or elsewhere; but, upon cross-examination, they admitted that there was a variation of sixty-three pounds between the heaviest and the lightest rail.

The defendant here rested, and the court charged the jury as follows:

28 "GENTLEMEN OF THE JURY: The plaintiff imported into this country from Russia, in 1880, a quantity of completed iron railroad rails, which he imported to be melted and rerolled, and which were subsequently sold for that purpose and were remanufactured into new iron railroad rails. They were entered as wrought scrap iron at $8 per ton. They were classified by the collector as iron bars for railroads or inclined planes, and a duty of 70 cents per hundred pounds was levied and paid.

The statute defines scrap iron to be waste or refuse iron that has been in actual use and is fit only to be remanufactured. It is in proof that this importation was fit in this country only for remanufacture. The only question is whether the iron had been in actual use, for the requirement that it should have been in actual use applies as well to waste as to refuse iron.

The plaintiffs take the burden of proof and must satisfy you affirmatively that they had been in actual use.

There is no positive evidence that the rails had ever been actually used. It is shown that they were finished and completed iron rails; that they had been sent to or were in Russia; that they were from three to eight years old; that they were rusted; that they were said to have been condemned by the Russian Government. This is all the evidence upon the subject. If you find that the plaintiffs have sustained the burden of proof and proved to your satisfaction that

they had been in actual use you will find for the plaintiffs; otherwise you will find for the defendant.

29 I am requested to charge, and I do charge, that in order to enable the plaintiffs to recover they must satisfy the jury by a fair preponderance of testimony that the imported article had been in actual use prior to its importation.

Second. That the burden of proof is upon the plaintiffs to establish by a fair preponderance of evidence that the imported article was actually used before its importation, and unless that fact be proven by evidence satisfactory to the jury the verdict should be for the defendant.

Third. That the seizure proceedings have no relevancy to the issue, and should not be taken into consideration by the jury."

Plaintiffs' counsel excepted to that portion of the charge that stated that the requirements of the statute in respect to actual use apply as well to waste as to refuse iron, and to so much of the charge as stated that in order to enable the plaintiffs to recover they must satisfy the jury that the imported article was in actual use prior to its importation.

The jury rendered a verdict for the defendant.

And inasmuch as the matters and things aforesaid do not appear by the record or otherwise than by this bill of exceptions, plaintiffs' counsel has caused the same to be made, and it was duly settled on the 22d day of September, 1887.

N. SHIPMAN, *Judge.* [L. S.]

(Endorsed:) U. S. circuit court, southern district of New York. E. P. Dwight and o'rs, as executors, &c., plaintiffs, *versus* Edwin A. Merritt, coll'r, defendant. Bill of exceptions. Stanley, Clarke & Smith. U. S. circuit court. Filed Sep. 26, 1887. Timothy Griffith, clerk.

30 Supreme Court of the United States.

EDMUND P. DWIGHT, JOHN C. BULLITT, and Clara W. Dwight, Executors of Isaac S. Waterman, Deceased, Plaintiffs in Error,
against
EDWIN A. MERRITT, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the third Monday of October term, in the same term, before the justices of the said court, at the Capitol in Washington, come the said plaintiffs in error, by Stanley, Clarke & Smith, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

II. That there was error in excluding the evidence offered to prove that the rails which are the subject of controversy were seized by the United States and subsequently released.

III. There was error in excluding testimony as to the meaning of the statutory terms "waste iron" and "scrap iron."

IV. The court erred in instructing the jury that unless
31 they found the rails had been in actual use prior to their importation the verdict must be for the defendant.

And the said plaintiffs pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

STANLEY, CLARKE & SMITH,
Attorneys for Plaintiffs in Error.

(Endorsed:) U. S. Supreme Court. Edmund P. Dwight & *al.*, pl'ffs in error, *vs.* Edwin A. Merritt, def't in error. Assignment of errors. Stanley, Clarke & Smith, att'ys for pl'ffs in error, 120
32 B'way, N. Y. city. Due service of a copy of the within is hereby admitted. N. Y., Oct. 17th, 1887. Stephen A. Walker, attorney for def't in error. U. S. circuit court. Filed Oct. 17, 1887. Timothy Griffith, clerk.

33 Supreme Court of the United States.

EDMUND P. DWIGHT, JOHN C. BULLITT, and CLARA W. Dwight, Executors of Isaac S. Waterman, Deceased, Plaintiffs in Error, *vs.* EDWIN A. MERRITT, Defendant in Error.	Joinder in Error.

And afterwards, to wit, on the third Monday of October term, in said term, the said defendant in error, by Stephen A. Walker, his attorney, comes here into court, and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Att'y for Defendant in Error.

34 [Endorsed:] 7506. United States Supreme Court. Edmund P. Dwight & *al.*, &c., plaintiffs in error, *v.* Edwin A. Merritt, defendant in error. Joinder in error. Due service of a copy of the within joinder in error is hereby admitted this 19th day of October, 1887. Stanley, Clark & Smith, att'ys for plaintiffs in error. U. S. circuit court. Filed Oct. 19, 1887. Timothy Griffith, clerk.

35 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EDMUND P. DWIGHT, JOHN C. BULLITT, and Clara W. Dwight, Executors of Isaac S. Waterman, Pl'ffs in Error,
vs.
EDWIN A. MERRITT, D'f't in Error.

Bond for Damages and Costs.

Know all men by these presents that we, Elias G. Cope & S. B. Knight, are held and firmly bound unto the above-named Edwin A. Merritt in the sum of two hundred and fifty dollars, to be paid to the said Edwin A. Merritt; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named Edmund P. Dwight *et al.* have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Edmund P. Dwight *et al.* shall prosecute their said writ of error to effect and answer all costs if they shall fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ELIAS G. COPE.
S. B. KNIGHT.

Sealed and delivered and taken and acknowledged this fifth day of Oct., 1881, before me—

ORLANDO G. HEMPSTEAD,
Notary Public.

36 [Endorsed:] U. S. circuit court, southern district of New York. Edmund P. Dwight *et al.*, p'ff- in error, *vs.* Edwin A. Merritt, def't in error. Bond for costs on writ of error to Supreme Court. Stanley, Clarke & Smith, att'ys for pl'ff- in error, 120 B'way, N. Y. city. Approved as to form, amount, and sufficiency of sureties. A. Brown, district judge. U. S. circuit court. Filed Oct. 12, 1887. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Elias G. Cope & S. B. Knight, being duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ELIAS G. COPE.
S. B. KNIGHT.

Office Supreme Court U. S.
FILED,
MAR 26 1891
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

EDMUND P. DWIGHT ET ALS.

vs.

EDWIN A. MERRITT.

No. 281.

BRIEF FOR THE PLAINTIFFS.

EDWIN B. SMITH,
Of Counsel.

STANLEY, CLARKE & SMITH,
No. 120 BROADWAY, NEW YORK,
Plaintiffs' Attorneys.

C. G. Burgoyne, 146-150 Centre Street, New York.

Sworn to this fifth day of Oct., A. D. 1881, before me—

[L. S.] ORLANDO G. HEMPSTEAD,
Notary Public.

37 UNITED STATES OF AMERICA, *ss:*

To Edwin A. Merritt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of October term, eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edmund P. Dwight, John C. Bullitt, and Clara W. Dwight, executors of Isaac S. Waterman, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated October 11th, 1887.

ADDISON BROWN,
Dist. Judge.

38 [Endorsed:] 7506. U. S. Supreme Court. Edmund P. Dwight & o'rs, plaintiffs in error, against Edwin A. Merritt, defendant in error. Citation. Stanley, Clarke & Smith, att'ys for pl'ffs in error, 120 B'way, N. Y. city. Due service of a copy of the within citation is hereby admitted. N. Y., Oct. 13th, 1887. Stephen A. Walker, attorney for defendant in error.

[Stamped:] U. S. circuit court. Filed Oct. 14, 1887. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 281. Edmund P. Dwight, John C. Bullitt, & Clara W. Dwight, executors of Isaac S. Waterman, deceased, plaintiffs in error, *vs.* Edwin A. Merritt, late collector of the port of New York. Filed October 24, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 281.

EDMUND P. DWIGHT ET ALS.

vs.

EDWIN A. MERRITT, Collr.

PLAINTIFFS' BRIEF.

Statement.

In June, 1880, plaintiffs' intestate imported into New York, from Pillau, about 375 tons of rusty old iron rails which cost him $32 a ton, delivered here (*exclusive* of duties), where new rails were selling at from $48 to $65 a ton (Record, 10 top). He subsequently sold them (duty paid) for $26.60 a ton (*Ib.*), although the invoice shows their value in the principal markets of Prussia to have been little over $20 (*Id.*, 8, fol. 19).

Though these were completed rails, Mr. Waterman imported them only to break them up and remanufacture them at his mill in Pennsylvania, which was ultimately done. In this country they were fit only for remanufacture, and merchantable for no other purpose.

They were of a pattern nowhere in use here; too high for safety upon our roads; so short as to require one-third more bolts, spikes and fish-plates, etc., than American rails; of excessive weight, and hence too expensive for use here (Rec., p. 10, top).

In a finished condition for a railroad they had been sent to Russia, but there was no direct evidence they had ever been laid upon a railroad, or used for any purpose whatever, except that (when imported) they were from three to eight years old, and were rusty *(Ibid.)*.

An expert, who had been familiar with scrap iron for thirty years, was asked: "What does scrap iron include?" and replied: "It includes all sort of waste and refuse iron."

Upon defendant's motion, based upon the claim that the testimony was incompetent and immaterial, since the statute defines scrap iron, this answer was stricken out; and the plaintiffs excepted. (Rec. 10, fol. 24).

The same witness was not permitted to answer the question "What is waste iron?" it having been excluded upon the same ground; and plaintiffs excepted. *(Ibid.)*

There was the same objection, ruling, exclusion and exception to this question: "What is refuse iron?" (Rec. 11., fol. 26.)

Plaintiffs' counsel stated the purpose of his inquiries to be to elicit the fact that, in trade and commerce, 'scrap-iron' is a general term, including two classes, to wit, waste iron and refuse iron; waste being that class of scrap which is new, like clippings, punchings, etc.; while refuse was such scrap as was no longer fit for the purpose for which it was originally intended. (Rec. 11., top.)

Another expert testified that (irrespective of commercial designation), as matter of fact, scrap iron was composed of two classes: (1.) iron that has been in use and (2.) that which, in the process of manufacture, is

spoiled, either by the quality or the rolling of it, so that it cannot, as a finished product, be put to the use for which it was intended.

He testified that, in rolling rails, the iron has to pass through the rolls maybe eight or ten times. If, when it is within two passes of being finished, it becomes defective, it is at once thrown off one side, sheared up, and put back into the furnace. It is scrap iron. To roll a rail thirty feet long that shall be perfect and fit to go into a railroad, it has to be rolled from thirty-one to thirty-six feet long, several feet having to be cut off from each end. That cut-off is scrap iron which has never been in use, and is fit for no other use than remanufacture. It goes right back into the furnace, and is re-rolled. In the process of manufacturing rails, when a rail is so far along as to be within one pass through the rolls of being completed, it is in the shape of a rail; but a pass may have made the flange a little bit thinner and changed the shape of the head a little. The last pass may make it a marketable rail. If it does not get that pass, it is but scrap;—nobody would have it.

The other scrap iron is old car-axles, old rails that have broken, old broken tires, old sleigh-shoes, and old boilers. Blacksmith scrap is almost invariably new iron, such as clippings of bars. Ex. gr., a blacksmith wants to make a bar four feet long; and the bar is four and a half feet long; he has to cut six inches off, and throw it into the scrap. Scrap of all descriptions is imported. (Rec., 11, 12.)

The defence introduced testimony tending to show the rails in suit to be of uniform length and weight, and not broken upon the edge or elsewhere. Upon cross-examination, a variation of sixty-three pounds between the heaviest and lightest rail was shown to exist. (Rec. 12, fol. 27.)

The evidence being all introduced, the jury were charged as follows;—

The plaintiff imported into this country from Russia, in 1880, a quantity of completed iron railroad rails, to be melted and re-rolled, and which were subsequently sold for that purpose and were re-manufactured into new iron railroad rails. They were entered as wrought scrap iron, at eight dollars a ton. The collector classified them as iron bars for railroads or inclined planes, and a duty of seventy cents a hundred pounds was levied thereon, and paid.

The statute defines scrap iron to be waste or refuse iron that has been in actual use and is fit only to be re-manufactured. It is in proof that, this importation was fit, in this country, only for re-manufacture. *The only question is whether the iron had been in actual use; for the requirement that it should have been in actual use applies as well to waste as to refuse iron.* . . . .

There is no positive evidence that the rails had ever been actually used. They were finished and completed iron rails; had been sent to, or were in, Russia; were from three to eight years old; were rusted; and they were said to have been condemned by the Russian government.

This is all the evidence upon the subject.

If you find the plaintiffs have sustained the burden of proof and proved to your satisfaction that they had been in actual use, you will find for the plaintiffs; otherwise, you will find for the defendant. (Rec. 12, 13; fol. 28.)

Upon defendant's request, the Court, in different phraseology, twice repeated the prior instruction, that the burden was upon plaintiffs to establish actual use of these rails prior to their importation.

Plaintiffs' counsel excepted to the instruction that the statutory requirement of actual use applied equally to waste and to refuse iron; and to so much of the charge as stated that, to enable the plaintiffs to recover they must satisfy the jury that the imported article was in actual use prior to its importation. (Rec. 13, fol. 29.)

All formalities of protest, appeal and suit were seasonably observed.

The jury rendered a verdict for the defendant.

Statutes.

Under the metal schedule (E) of Sec. 2504 of the Rev. Stats. (page 464 of 2d ed.), the collector dutied our importation, under this clause:

Iron bars for railroads or inclined planes; seventy cents per one hundred pounds (Heyl, ¶ 991; Rev. Sts., ed. A.D. 1878, p. 464.)

The importer entered and claimed to have these rails dutied under this clause of the same schedule; here punctuated according to our idea of its meaning:

Wrought scrap iron of every description, eight dollars per ton; but nothing shall be deemed scrap iron except waste, or refuse iron that has been in actual use, and is fit only to be re-manufactured (Heyl, ¶ 1035; Rev. Sts., 2d ed., p. 466.)

Assignment of Errors.

I. There was error in striking out this question "what does scrap iron include?" and the answer, "It includes all sorts of waste and refuse iron?" (Rec. p. 10, fol. 24.)

II. It was error to exclude this question; "what is waste iron?" *(Ibid.)*

III. There was error in excluding the testimony as to the meaning of the statutory terms 'waste iron' and 'scrap iron.' (Rec. pp. 10, 11 and 14 top, ¶ III.)

IV. The Court erred in instructing the jury that unless they found the rails had been in actual use prior to their importation, the verdict must be for the defendant. (Rec. 13, top, and 14, top, ¶ IV.)

V. It was error to exclude this question: "What is refuse iron?" (Rec. 11, fol. 26.)

VI. There was error in this language of the charge to the jury :

" The only question is whether the iron had been in actual use ; for the requirement that it should have been in actual use applies as well to waste as to refuse iron. (Rec. 12, fol. 28.)

VII. The Judge erred in saying to the jury this :

" I am requested to charge, and I do charge, that, in order to enable the plaintiffs to recover, they must satisfy the jury by a fair preponderance of testimony that the imported article had been in actual use prior to its importation." (Rec. 13, top ; fol. 29.)

VIII. It was error for the Judge thus to instruct the jury, viz. :

" That the burden of proof is upon the plaintiffs to establish by a fair preponderance of evidence that the imported article was actually used before its importation ; and unless that fact be proven by evidence satisfactory to the jury, the verdict should be for the defendant." *(Ibid.)*

IX. There was error in rendering judgment for the defendant, instead of for the plaintiffs, upon the undisputed testimony. (Rec. 8 to 14 ; and 7.)

POINTS.

I.

However this Court may rule upon the specific questions and exceptions which this record presents, it is obvious that the action of the Collector actually worked gross injustice, while we deem it manifestly not in conformity with law ; and consider that the importer was

subjected not only to an inequitable, but to an illegal and extortionate, exaction.

Twenty-three and eight-tenths cents was the then-proclaimed equivalent, in our currency, of the German mark. (Heyl, ed. of 1879, Part. III, p. 18.)

Accordingly, the invoice value of these old, rusty, rails, in U. S. money, was $10,562.43. (Rec. 8, Ex. 1). This is the foreign market valuation.

They actually cost Waterman about $12,000. (*Id.* 10 top.)

He sold them for $9988.30, or within a dollar or two of that. (*Ibid.*)

The duty exacted was $5881.40; over 50% upon merchandise of this character, brought here as the raw material of a domestic manufacture! (*Id.* 8, 9.)

The collector assessed upon this old iron the duty imposed upon "iron bars for railroads or inclined planes." (See ante, p. 5.)

The invoice properly described them; but the appraiser inaccurately reported them as "iron railway bars, 70 cnts. p. 100 lbs." (Rec. 8.)

The statute contained no *such* enumeration or classification.

Upon the undisputed testimony, which led the judge (in his charge) to tell the jury "It is in proof that this importation was fit, in this country, ONLY *for re-manufacture*" (Rec. 12, fol. 28) they manifestly were *not* dutiable as intended "for railroads."

They were NOT "*for railroads,*" *but for a furnace.*

The Revised Statutes, under which our goods were dutied, was merely a consolidation of earlier acts, in force Dec. 1st, 1873. It was not the Congressional purpose or expectation that the compilers should make any change of the then-existing law; nor was it their intention to do so; and it is only in the few sporadic instances, where such is the necessary and unavoidable effect of the Congressional adoption of the Commis-

sioners' phraseology, that this Court will assign to any section or language of the revision a meaning different from that inhering in the earlier legislation it embodies.

U. S. v. Bowen, 100 U. S. 508.
Myer v. Car Co., 102 Id. 11.
Viterbo v. Friedlander, 120 *Id.* 726.
Ex p. Crow Dog, 109 *Id.* 556.
U. S. v. Le Bris, 121 *Id.* 279.

If there be any ambiguity in Section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law. [Citing cases.]

And it is said that *this is especially so where the act authorizing the revision directs marginal references,* as is the case here.

U. S. v. Lacher, 134 U. S. 626-7.
Pentlarge v. Kirby, 22 Blatch. 264.

Recurrence to the statutes marginally referred to, from which this provision was taken, relating to "iron bars for railroads," establishes the construction for which we contend; and shows this phrase to indicate only such bars as are imported in a condition adapting them to immediate use upon the roads of this country.

The first appearance of this clause is in the act of March 2, 1861, c. 68, § 7, in this form;—

"On all iron imported in bars for railroads or inclined planes *made to patterns and fitted to be laid down upon such roads* or *planes without further manufacture,* and not exceeding six inches high, twelve dollars per ton." (12 Stats. 180 bottom.)

But, prior to the revision, this statute and phraseology were changed, by the act of June 30, 1864, c. 171, § 3, by omitting the limitation of height, and substituting a rate by the pound for that by the ton, as follows:

On all iron imported in bars for railroads and inclined planes, *made to patterns and fitted to be laid down on such roads and planes without further manufacture*, sixty cents per one hundred pounds (13 Stats., 204 top).

The additional ten cents per hundred were imposed by the second section of act of Mch. 3, 1865, c. 80 "on iron bars for railroads or inclined planes, ten cents per one hundred pounds" (13 Stats., 493 top), under the pressure of financial necessity.

These two last-mentioned tariff provisions are those reproduced in this brief phrase of the Revised Statutes:

"Iron bars *for* railroads or inclined planes, seventy cents per one hundred pounds."

"There may be a slight obscurity in this section, arising from a practice, followed in many other passages of the Revised Statutes, where, in revising and consolidating preceding statute provisions, *the fewest words possible were adopted*."

Com. v. Hancock, 2 Gray, 68 top.

This case is worthy of examination. It suggests such change of *punctuation* and addition of words as would make the revision conform to the act revised; and construes it as so read.

Thus is shown the collector's error is assessing as iron bars for railroads iron proved by all the uncontradicted testimony not to be adapted to any such use, nor imported for that purpose, but only to be melted and cast into whatever forms might be given to the molten mass of which these bars would become a part.

It is its condition *as an import*, as an article of *this* country's commerce, that must be ascertained to fix its dutiable character.

II.

In a custom's case in New York, the Circuit Judge—following an earlier decision there and the rulings of Justices WOODBURY and CURTIS in Wilkinson v. Greeley, 1 Curt., 64, 65 and 67—held that the burden of proof was upon the collector to justify his exaction. This Court reversed the judgment (Arthur v. Unkart, 96 U. S., 118), holding that the importer who complained of the collector's action must show its illegality. The opinion in 96 U. S., 121, 123, ignores or overlooks the premise of the opposite conclusion reached by the learned Judges above mentioned, viz., that the *invoice* is to be accepted as indicating the true basis of duty unless its statements are shown incorrect by extrinsic evidence (1 Curt., 64, middle).

U. S. v. 67 Pckgs., *17 How., 90.

The *ground* of error (if any there be) in this assumption is not shown, nor is the subject discussed, in 96 U. S., 118–123; and it not only seems abstractly just and correct, but is sustained by the antecedent decisions of this Court, and has been adopted by Federal Judges in other than the First Circuit.

Morlot v. Lawrence, 3 Blatch., 123.
Lottimer v. Smythe, 17 Int. Rev. Rec., 13.

Judge WOODBURY, when he tried the Wilkinson case, had in mind this language in which he had, shortly before, expressed the opinion of the Supreme Court:

"It would be *unreasonable to overturn the invoices and oaths of the importers*, unless by a personal inspection and examination; an insufficient value should clearly appear to have been affixed, considering the quality of the article first," etc.

Greely v. Thompson, 10 How., 239.

In an opinion per WAYNE, J., the Court considers an

objection to an appraisement rendering it "insufficient to displace the value declared upon the entry."

Sampson v. Peaslee, 20 *Id.*, 576.

The requirement and presentation of invoices and entry under oath and the denunciation of forfeitures, makes this very different from the question arising in that class of cases (attaching officers, etc.) alone cited and relied upon in 96 U. S., 122–3; especially so, unless that decision be confined to the point that the plaintiff's burden is to show the collector's classification or appraisal illegal. 96 U. S. 122 bottom.

It is thus that the law has been construed, in different circuits, since the 96 U. S. Reports appeared.

CLARK, J. "The burden is upon the plaintiffs *to show the illegality complained of.*"

Forbes v. Worthington, 25 Fed. R. 902.

MCKENNAN, C. J. instructed the jury:—

"The U. S. *having classified this article differently from the invoice* designation of it, and imposed a higher duty upon it than it would otherwise have been subjected to, *the burden is upon the U. S. to satisfy you that there has been a proper classification of this article* by the collector, *and that the rate of duty imposed by law only was exacted* by him."

Kennedy v. Hartranft, 9 F. R. 20.

DEADY, J. "An issue was also made in the pleadings as to whether this article is 'starch' etc. . . . . This issue was tendered by the defendant, and in the trial of it the burden of proof is upon him." Chung Yune v. Kelly, 14 F. R., 642.

Sharswood's Stark. on Ev. (8th Am. Ed.) 586–7 and notes.

We invoiced and entered our goods as old, rusty rails, dutiable at seventy cents a hundred pounds. The Collector classified and assessed them as "for rail-

roads"—which they confessedly, upon all the proof, were not.

Thus have we sustained the burden cast upon us, established the illegality of the classification and exaction of the defendant, and entitled ourselves to have the goods dutied according to the invoice and entry of them.

The defendant admitted our invoice to be correct, *unless* these old rails were "for railroads"—which we proved they were *not*.

III.

If, however, the burden be upon us to further sustain our invoice and entry by proof of their correctness *beyond the actual attack made upon them* by the defendant, we claim to have done so, fully, so far as permitted by the Court;—and that there was error in those rulings which restricted us in doing so.

Passing over, as of secondary (if of any) importance, the striking out of the witness' (Cox) definition of 'scrap-iron' (Rec. 10, fol. 24) we strenuously insist it was error to exclude testimony showing that the term 'waste' had a technical meaning in the trade and commerce which this statutory provision affected; and that 'refuse' iron also had such meaning; and that they were not synonymous. (Rec. 10, 11.)

Though most frequently avowedly applied to tariff legislation, it is as to all statutes—indeed, as to all language—

"The first and most elementary rule of construction, that it is to be assumed that words and phrases are used

in their technical meaning *if they have acquired one*," etc.

Endlich, Interp. of Stats., §§ 2, 74.
Ex p. Hall, 1 Pick. 261.
Brockett v. R. R. 14 Pa. St. 241.
State v. Smith, 5 Humph. 394.

Whether or not "they have acquired one" is a subject of evidence.

"The terms of every document must, in the absence of testimony, be construed in their *primary* sense," 2 Taylor on Ev. § 1131. If the language refer to any art, science or special business, the presumption is that the words are used technically. *The technical is the primary meaning. Ib.*, citing Shore v. Wilson, 9 Cl. & Fin. 555 etc.

Doe v. Perratt, 6 Man. & Gr. 342.

If technical, or capable of two or more interpretations, the testimony of experts is to be received, particularly as to usage. It *must* be taken, because the words are technical, and the Court takes no judical cognizance of the technicalities and terminology of any one branch of business or commerce.

Bodmin, 23 Beav., 370.

And the rule is the same in construing statutes regulating trade, or trade contracts.

Endlich, Interp. of Stats., §§ 74 *and 75.*

"BLACKBURN, J. The decision of this case depends upon the rule that, in construing a written contract relating to a particular trade, the words of the contract are to be understood in the sense which the word has acquired in trade. *Prima facie*, as a matter of construction of the contract, it is to be taken that the parties use the phrase in the peculiar and limited sense which it has acquired in the trade. *That limited and peculiar sense*, if such has been acquired, *must be shown by parol evidence;* and this having been shown, the

presumption is that it is the sense in which the parties making the contract [or statute] used it."

Myers v. Sarl, 7 Jur. N. S., 99.
Lawson on Usages, § 181.
Doe v. Perratt, 6 Man. & Gr. 342.
Myers v. Sarl, 7 Jur. (N. S.) 97.
Same case in 30 L. J. (Q. B.) 9.
Shore v. Wilson, 9 Cl. & Fin. 555.
Grant v. Maddox, 15 M. J. W. 737.
Smith v. Clayton, 29 N. J. L. 367, last sentence of Op.
Williams v. Woods, 16 Md. 220.
Eaton v. Smith, 20 Pick. 156.
Broadwell v. Broadwell, 6 Ill. 611.
Collendar v. Dinsmore, 55 N. Y. 206.

Apparently, Judge SHIPMAN's position was this; that the trade meanings of 'waste' and 'refuse' iron, and the difference between them, were immaterial, because Congress had attached to *both* the condition-precedent of 'actual use' before either could come in at the rate of duty for which plaintiffs contend.

On the other hand, our assumption was, and is, that these meanings and this difference were of primary importance in determining whether or not Congress *had* imposed this condition as to both.

We offered to show that there were two classes of material; that while waste was iron that never had been in actual use, refuse iron was that which was second-hand or used up; for the purpose of indicating that the facts imperatively required the 'actual use' to be restricted to the latter class of material, so far perished in the using as to be "fit only for manufacture."

Had we been allowed to establish the distinction we alleged to exist, it would have been a persuasive argument against the construction adopted by the Court; since it would have shown that, upon such a construction, there would be *no* waste dutiable under it, inas-

much as none is ever put to any other use than remanufacture.

The late Justice SWAYNE repeatedly stated the maxim that it is the intent of the law-makers which is the law, whether that be found within or without the letter of the statute (1 Black, 61; 11 Wall. 504; 94 U. S. 300; 95 *Id.* 763; 101 *Id.* 626); but the only means of ascertaining that intention is by the application of the words to the subject-matter.

Brewer v. Blougher, 14 Pet. 198.
Market v. Hoffman, 101 U. S. 116.
Caldwell's Case, 19 Wall. 268.
Lion Ins. Co. v. Tucker, L. R. 12 Q. B. D. 186.
Peo. v. Dana, 22 Cal. 20.
Anderson v. R. R., 117 Ill. 26.

Accordingly, as Judge BLACKBURN observed:

"The same words might mean a very different thing when put in to impose a tax from what they would mean when exempting from a tax."

Rein v. Lane, L. R. 2 Q. B. 151.

It was held reversible error to exclude testimony that the words "waste ground" in railroad contracts meant soil which had been excavated in construction.

Prather v. Ross, 17 Ind. 495,

quoting this paragraph from Brown v. Brown, 8 Metc. 576, that ordinarily

The meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are, *prima facie*, matter of law, to be construed and passed upon by the Court. But language may be ambiguous and used in different senses; or general words, in particular trades and branches of business—as among merchants, for instance—may be used in a new, peculiar or technical sense: and therefore, in a few instances, evidence may be received from those who are conversant

with such branches of business, and such technical or peculiar use of language, to explain and illustrate it.

Our testimony was excluded upon the specific objection and ground that the statute defines "scrap-iron." (Rec. 10, fols. 24 to 26.)

True; but it does so by designating, as included within that term, both waste and refuse iron; without defining either of these.

We can only apply this statute to the subject matter, and determine what importations are embraced within the term which it does define (scrap-iron) by seeing what articles are known to commerce as waste, and what as refuse iron; and if no such terms are employed in the iron trade, to which this schedule relates, then (and not until then) are we to inquire as to the ordinary meaning of these words.

"Where a *general* descriptive term is employed in a statute in connection with words of *particular* description, the meaning of the General Term is to be ascertained by reference to the words of particular description."

Butterfield v. Arthur, 25 Int. Rev. Rec. 248.
Here, on Ap., 125 U. S. 70.
U. S. v. Weise, 2 Wall. p. 77 (GRIER, J.).
Endlich, Interp. §§ 400, 405 etc.

Without rehearsing the language of the numerous cases in which this Court has declared commercial meaning to be, *prima facie*, the one attaching to tariff nomenclature, we will quote two sentences from one of the most recent of them, stating that which Mr. Endlich (see *supra*) considers "the first and most elementary rule of construction."

"The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws [citing cases.]

But if the commercial designation fails to give an article its proper place in the classifications of the law, *then* resort must necessarily be had to the common designation."

Robertson v. Salomon, 130 U. S. 415,
citing Arthur v. Lahey, 96 *Id.* 118.
Barber v. Schell, 107 *Id.* 623.
Worthington v. Abbott, 124 *Id.* 436.
Arthur v. Butterfield, 125 *Id.* 75.

The statute permits entry, as scrap-iron of either of two articles (1) waste, or (2) refuse iron—if there be any difference. If any iron sought to be so entered is neither waste nor refuse, it must be excluded from this privilege.

But, to determine this, we assert it to be absolutely essential to ascertain what, if anything is commercially known as 'waste' and what as 'refuse,' and the trade distinction (if any) between them. It was this right which was denied us.

The witness had stated what 'scrap-iron' included in trade and commerce. It was error to strike this out (Rec. 10, fol. 24), because we had a right thus to establish the existence of technical meanings attaching to all *three* designations employed in this tariff clause, as tending to show Congressional recognition of these meanings, and an intention that their language should be construed in conformity therewith; and also because this question and answer was merely preliminary to showing the meanings of the included terms 'waste' and 'refuse' for the same purpose.

Another witness was permitted to state the *fact* that there were these two classes of scrap (Record, 11, 12, fols. 26, 27); but we were inhibited from proving that the trade recognized that fact, and gave to each class its appropriate name, which were *the* designations adopted by Congress in this clause.

We cannot understand the logic of the government's

position below, nor how this *fact* was pertinent and admissible, while the commercial recognition of it was not.

IV.

If it was error to exclude our testimony as to the trade meanings of 'waste' and 'refuse,' then the facts and definitions we sought to establish must be accepted as true in ascertaining the proper construction of this statute, for the purposes of this case here.

If it be conceded that 'waste' means *new* scrap, which perished (commercially) in the making; and that 'refuse' means *old* scrap, which has perished in the using; then that construction which extends the requirement of 'actual use' to waste as well as to refuse is absurd and contradictory.

Dunelm, L. R. 9 P. D. 171.

It assumes to give and to withhold a privilege in the same sentence.

In arguing that the phrase should be read as if a comma followed waste, and so that the requirement of actual use is confined to 'refuse,' we understand that punctuation, or the omission of it, is immaterial in construing a statute. We all realize that we are entirely at the mercy of the printer, in this particular, and that he inserts such 'stops' as please him, regardless of the effect upon the draughtsman's meaning, often 'capriciously.' (1 Woodwd. 130 top). Hence, a comma may be eliminated, inserted or transferred.

Hammock v. Loan Co. 105 U. S. 84, 85.
U. S. v. Isham, 17 Wall. 502 top.
Gyger's est. 65 Pa. St. 311, 312.
Com. v. Shopp, 1 Woodw. 130.

Martin v. Gleason, 139 Mass. 183.
Lambert v. Peo., 76 N. Y. 225 bot.
Shreidley v. State, 23 Oh. St. 140, where a comma was inserted.
In Com. v. Hancock, 2 Gray, 78, SHAW, C. J., suggests the interpolation of a semi-colon.
Albright s. Paine, 43 *Id.* 8.
Cushing v. Worrick, 9 Gray, 382,

in which case it was observed that a limiting clause "is ordinarily to be confined to the last antecedent, unless there is something in the subject-matter which *requires* a different construction." (9 Gray, 385.)
Valentine v. Borden, 100 Mass. 279.

The Court will note that the construction for which we here contend simply perpetuates (in a little different form) the statutory recognition of a physical and commercial fact which had obtained in preceding legislation.

Our contention is that, in the Act of July 14, 1870, c. 255, § 21 (16 Stats. 264), which is almost literally reproduced in the clause of the revision under which our goods are dutiable, the same distinction between new scrap (waste) and old scrap (refuse) has been preserved that had therefore been maintained for nearly forty years.

The tariff of 1832 duties "all scrap and old iron;" "that nothing shall be deemed *old* that has not been in actual use, and fit only to be re-manufactured." (4 Stats. 588.)

Thus phrased in the Act of August 30, 1842, c. 227, § 2, cl. "*Third*":

"On all old or scrap iron, $10 per ton; *provided* that nothing shall be deemed *old iron* that has not been in actual use, and fit only to be re-manufactured." (5 Stats. 552, "Third.")

Probably the dropping of the conjunction in the Act of March 2, 1861, c. 68, § 7, cl. Third (so it read 'old

scrap iron') was accidental; as the proviso in that act (12 Stats. 181) and the Act of June 30, 1864 (13 Stats. 205) is the same, verbatim, as that above quoted.

The testimony, to the exclusion of which we except, shows that the changed phraseology of the Act of 1870 (16 Stats., 264) simply intends the same meaning that was expressed in the earlier acts from 1832 down.

Aldridge v. Williams, 3 Howd. 24.

In addition to the cases hereinbefore cited (102 U. S. 1 and 109 *Id.* 556 *et als.*) the following may be referred to, as showing recurrence to repealed provisions in construing existing law.

Pratt v. Boston, 139 Mass. 559.
Ham v. Same, 142 *Id.* 94.
Forqueran v. Donnelly, 7 W. Va. 127.
Attorney-Gen. v. Lamplough, 3 Ex. Div. 223.
Bank v. Collector, 3 Wall. 495.

V.

Even if the requirement of actual use attaches to 'waste,' as well as to 'refuse' iron, yet we were entitled to show the commercial meaning of these terms, as indicating the *character* of the use of which each is susceptible.

The statute, certainly, can require nothing more of 'waste' than *such* use as it, from its nature, is susceptible of.

If the ends cut off in the making of these rails have been 'used' in that operation, *a fortiori* is the same manipulation a use of that iron which remains in the finished product.

VI.

The meaning we asked leave to prove as commercially attaching to the words 'waste' and 'refuse' in connection with the iron business is their ordinary signification.

It is similar to that attached to the words "woolen rags" and "waste" in Schedule L of the tariff provisions of the Revised Statues. (Page 471 of second edition).

The 'rags' are the 'refuse,' used-up articles fit only for re-manufacture; while the "waste" is wool which has never yet entered into any article.

Waste-water is let off through the sluice or waste-gate unused, as being in excess of that which is required for use.

To waste is to squander or destroy, as distinguished from beneficial using.

A waste is a stretch of land not appropriated to use.

Tenant's *use* of an improved estate is distinguished from *waste* of it. *Per* MARCY, J. "The very term *waste* implies the idea of detriment" (3 Wend. 342); *i. e.* that some material, or labor upon material, involves a loss to its proprietor.

Where a man's whole estate consisted of his physical and mental faculties, ROBERTSON, C. J., held he was *wasting* them by intemperance, which disqualified him from *using* them.

Shuck v. Shuck, 7 Bush, 307.
McKay v. McKay, 18 B. Mon. 9.

Wasted opportunities are those not employed.

VII.

Unless 'waste' has the meaning we assign it, it is superfluous and senseless. To treat it as synonymous with 'refuse' is to destroy all its usefulness, and is opposed to the principle that no word is to be deemed unmeaning or superfluous, but is to be given its due effect, if an appropriate meaning and additional force can fairly be attributed to it.

Only as we define, and offered to prove it, can this be said of it:

The word is sensible *in the place where it occurs*, and it is the duty of the Court, when it can, to give effect to every word in every enactment, if it can be done without violating the *obvious* intention of the legislature. U. S. v. Gooding, 12 Wheat, 477.

Judge STORY mentions, in this opinion, that it overrules two theretofore given by him, in the first Circuit, upon the same Statute.

Construing the meaning of 'waste,' as used in a contract, differently from its common-law interpretation WILDE, C. J. observed:

"This construction of the covenant will account for the peculiar language in which it is expressed, will give a reasonable sense to *all* the words of the covenant, and will prevent any inconsistency or discrepancy between different parts of the Case."

Doe v. Price, 8 Q. B. 904.

VIII.

Our construction does equity, and is agreeable to common sense, in placing both classes of scrap-iron—which the testimony shows in fact to exist—designed

for the same purpose of remanufacture, upon the same footing as imports.

If doubt can remain as to the true reading of this Statute, it should be solved in favor of the plaintiffs.

Hartranft v. Wiegmann, 121 U. S. 609.
U. S. v. Isham, 17 Wall. 504.
Powers v. Barney, 5 Blatch. 202.
Adams v. Bancroft, 3 Sumn. 384.
Gurr v. Scudds, 11 Exch. 190–1.

A construction making so great a difference in duty upon imports having precisely the same commercial character, and a common destiny, would be generally as destitute of reason as it is unjust in its operation upon the present plaintiffs.

"And we should discard any construction that would lead to absurd consequences." U. S. v. Kirby, 7 Wall. 482.

Oates v. N. Bk. 100 U. S. 244.
Chew Heong v. U. S. 112 *Id.* 555.
Perry v. Skinner, 2 M. & W. 471.
Jersey v. Davidson, 29 N. J. Law, 424.

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Supreme Court of the United States.

OCTOBER TERM, 1890.

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BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT.

This suit grows out of an importation by Brown Brothers & Co. of "1827 *pieces iron rails, rusty,*" as described in the invoice (p. 8), or "*iron railway bars,*" as designated by the appraiser (p. 8), or "*pieces old iron rails,*" as described in the original entry (p. 8), and the entry on withdrawal from warehouse (p. 9).

The bill of exceptions states that these rails "were finished and completed rails for a railroad, and had been sent to Russia" (p. 10). It also states "there was no evidence that they had ever been used for any purpose

whatever, or had ever been laid upon a railroad, except that they were, when imported, somewhere from 3 to 8 years old."

These rails were imported to be broken up and remanufactured. "They were of so high a pattern as to make them unsafe for use on railroads in this country," and for various economical reasons, stated in the bill of exceptions, were not adapted for use in this country in their condition as imported (p. 10). And, at the time this importation was made, it would have been cheaper to import a new rail of this character, if it could have been brought in as "*scrap iron*," and remanufacture it into railroad bars than to buy pig-iron for that purpose (p. 10).

The defendant assessed duty on this merchandise at 70 cents per one hundred pounds, under the provision of Schedule E of section 2504, Revised Statutes, which lays that rate of duty on "*iron bars for railroads or inclined planes.*" Against this action of the collector the importer protested, contending that the merchandise was dutiable only at $8 per ton as "wrought scrap-iron," under the following provision of the said schedule and section, namely:

> Wrought scrap-iron of every description, eight dollars per ton. But nothing shall be deemed scrap-iron except waste or refuse iron that has been in actual use, and is fit only to be remanufactured.

The case was tried before Judge Shipman on January 25 and 26, 1886, and a verdict rendered for the defendant.

In the course of the trial several exceptions were taken to rulings of the court (pp. 7–13), which will be noticed below.

ARGUMENT.

I.

The judge charged the jury that the merchandise, to be classified as "*scrap-iron*," must be proved to have been "*in actual use*," and that the burden of proof was on the plaintiffs to establish this by a preponderance of testimony (pp. 12, 13). To which the plaintiffs excepted (p. 13).

The view taken by the court that nothing can be "*wrought scrap iron*" under the tariff that has not been "*in actual use*" is the interpretation that was *always* put on the law by the Treasury Department, as shown by repeated rulings (S. S. 1986, 4115, 4512), is the interpretation put on the law by Attorney-General Devens in his opinion of January 24, 1880 (16 Op., 445), and is the interpretation adopted and approved by Congress which reënacted the said scrap-iron provision of Schedule E in the tariff of March 3, 1883, as follows:

> Iron in pigs, iron kentledge, spiegeleisen, wrought and cast scrap iron, and scrap steel, three-tenths of one cent per pound; *but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel that has been in actual use and is fit only to be remanufactured.*

It is not necessary to go to the books to show that Congress, by reënacting this language of the previous tariff, adopted, as a part of it, the settled meaning that had been placed on it by the department of the Government whose duty it was to enforce it. It has been always so held with reference to British statutes reënacted in this country, and the force of this argument is not broken by the fact that the approval by Congress of the Executive construc-

tion of the law did not take place until after the importation in this case was made.

In the face of all this it would have been remarkable, indeed, if the learned judge below had adopted the strained and ungrammatical construction contended for by the other side.

That contention is that the statutory definition of scrap iron, namely, "*waste or refuse iron, that has been in actual use and is fit only to be remanufactured,*" should be so read as to refer the words "*in actual use*" to refuse scrap iron and not waste scrap iron; but, by a strange inconsistency, the other qualifying words, "*fit only to be remanufactured,*" that follow, are referred to *both* waste and refuse scrap iron.

But the subject of both these qualifying terms, "*in actual use*" and "*fit only to be remanufactured,*" is "iron." What iron? Why "*waste or refuse iron.*" Does it not seem clear, then, "that waste or refuse iron," to be dutiable as scrap iron, must be "*iron that has been in actual use* and is fit only to be remanufactured?" "*Waste or refuse*" are the predicates of the same subject "*iron,*" which latter is clearly the subject of the attributive words that follow.

Evidently the legislature regarded waste and refuse iron as pretty much the same thing, and the use of the conjunction "*or*" shows this, for the particle *and* would have been used if Congress had recognized a substantial distinction between them. Webster defines the adjective *waste* as as anything "lying unused, unproductive, of no worth, valueless," and the adjective *refuse* he defines as

anything "refused; rejected; *hence* left as unworthy of reception; of no value; worthless."

Thus we see that these two adjectives, *waste* and *refuse* are as nearly synonymous as two words ever are, and may be used interchangeably. It would be perfectly proper to speak of a waste-basket full of refuse stuff, and while it might be a little out of the way to speak of a refuse basket full of waste stuff, it would be proper to do so.

The argument pressed here, that it can not be supposed that Congress intended to exclude from the classification of scrap iron iron which from its nature could not have been "in actual use," such as clippings and punchings of iron, and which could be put to no use but that of being remanufactured, was met by Attorney-General Devens in the above-cited opinion. He said:

> The argument most forcibly pressed against this construction is *that it makes an arbitrary discrimination between material of like character that can only be used for the same purpose.*
>
> It is said that these clippings and punchings of iron are imported in a mass with old horseshoes, household utensils, etc., all designed for the foundry, fit for noth ing else, bought at one price abroad and brought in as one importation, and that it is inequitable to admit the old pots, horseshoes, etc., at $8 a ton and exact from $22.40 to $33.60 per ton on the new scrap, possessing no higher value and adapted to no different use.
>
> The answer is, that our tariff legislation has confessedly been framed not merely to produce a revenue to defray governmental expenses, but incidentally to protect American industry and enterprise. The iron interest has always been deemed worthy of special regard. It is therefore for Congress to say what discrimination shall be made between articles apparently designed for the same or similar uses in the commerce and business of this country, and this discrimination is not to be disregarded or frittered away by subtle argument because to others it may appear arbitrary or unreasonable.
>
> A comparison of earliest and existing statutes will show that, as to other metals and raw material, Congress has made this same discrimination as to old and new scrap, etc.

II.

The question before the court being whether the adjective clause "*that has been in actual use*" belonged to "waste" as well as "refuse iron," the defendants offered testimony for the purpose of showing what were the meanings of those terms in trade and commerce. It would be difficult to show a plainer case of *irrelevancy* than this offered and rejected evidence.

The question was one of law, and did not turn on the meaning of the terms "*waste or refuse iron*" at all, and the evidence offered could not have assisted the judge in applying the rules of grammar to the words of the law.

III.

THE BURDEN OF PROOF.

The plaintiffs having wholly failed to show that the iron in question had been used, boldly assert that the burden was upon the collector to show that the iron had not been used. But what is there to show that the iron had been used? It is admitted that no testimony to that effect was offered. But the invoice is appealed to. That document refers to so many "*pieces iron rails, rusty*," which means nothing, so far as use or nonuse is concerned, for all iron allowed to lie exposed to the weather will rust.

The exigency of the plaintiffs' case requires that the burden of proof should be cast on the collector, and nothing will do but the court should brush away, as an obstruction to the peculiar justice the plaintiffs ask, the doctrine laid down in *Arthur* v. *Unkart* (96 U. S., 118),

that the decision of a collector carries with it the presumption of correctness, a rule which the court say "is not only wise and prudent, but is in accordance with the general principles of law that an officer, acting in the discharge of his duty upon the subject over which jurisdiction is given to him, is presumed to have acted rightly" (p. 122).

And this doctrine was reaffirmed in *Tyre and Spring Works Company* v. *Spalding* (116 U. S., 541, 547), where the court say: "Those decisions [of the collector and Secretary of the Treasury] stand and are conclusive, under § 2931 of the Revised Statutes, *until the contrary is shown in a suit*," citing *Arnson* v. *Murphy* (115 U. S., 579, 584).

Notwithstanding this series of decisions this court is requested to return to the doctrine repudiated in them.

In the same spirit we are asked to repunctuate the Revised Statutes and to go behind their plain unambiguous language and try to build up an ambiguity by resorting to the rejected words of supplanted legislation, in the face of what this court said in *United States* v. *Bowen* (100 U. S, 508):

> When the meaning [of the Revised Statutes] *is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision,* but may do so when necessary to construe doubtful language used in expressing the meaning of Congress (p. 513).

Further argument is unnecessary to show that the case of the plaintiffs in error is destitute of merit and that the judgment should be affirmed.

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O